STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of LEWIS W. POE, Complainant, and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO, Respondent.	CASE NO. CU-03-214 DECISION NO. 446 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER

On January 16, 2003, Complainant LEWIS W. POE (POE), pro se, filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board). POE alleges that Respondent HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA or Union) breached its duty of fair representation when it engaged in settlement negotiations with the public employer on behalf of all Harbor Traffic Controllers to resolve the issue of rest periods raised by POE in a grievance, but failed to notify POE or his fellow employees of the results or outcome of such negotiations. POE contends that the HGEA committed a prohibited practice by violating Hawaii Revised Statutes (HRS) §§ 89-8(a) and 89-13(b)(2), (4), and/or (5).

On February 14, 2003, POE filed Complainant's Motion to Strike specific portions of Respondent's Prehearing Conference Statement filed on February 12, 2003 with the Board. POE contended that paragraphs 1-4 of HGEA's prehearing conference statement was responsive to the complaint rather than a clarification of the issues and therefore constituted an untimely answer which should be stricken.

On February 21, 2003, the HGEA filed a memorandum in opposition to POE's motion to strike and also, a motion to dismiss the complaint. In its motion, the HGEA contended that the instant complaint asks the Board to find that the HGEA committed a prohibited practice by allegedly failing to continue negotiations and settle the issue of rest periods with POE's employer. However, the HGEA alleged that in 1998, POE revoked his earlier requests for representation in a class grievance and never asked for representation for his individual grievance. Thus, the HGEA contends that it has no duty to represent any class

or POE regarding the earlier proposed settlement. As a result, HGEA argues that any settlement discussions or negotiations would have been and are entirely gratuitous.

On March 5, 2003, the Board held a hearing on the motions. POE represented himself and the HGEA was represented by counsel. The parties were afforded full opportunity to argue the motions. As discussed below, the motions were denied and trial was set for April 22, 2003.

On March 18, 2003, POE filed Declarations of Lewis W. Poe with Respect to a Document Filed on August 12, 1998 in Case No. CU-03-148. POE's declaration included a statement in the other case that there were other employees who could be affected by the outcome or ramification of the case.

On March 27, 2003, the HGEA filed Respondent's Motion to Continue Trial requesting a 30-day continuance of the trial scheduled on April 22, 2003 to May 22, 2003 to accommodate its primary witness. According to the affidavit of Sanford Chun (Chun), the HGEA's primary witness at trial, stated that due to his role as spokesperson for HGEA's Units 02 and 03 contract negotiations and ratification meetings, it would be very burdensome for him to prepare for and testify at the April 22nd trial because the negotiations timetable required completion prior to the end of the legislative session scheduled on May 1, 2003.

On April 1, 2003, POE opposed HGEA's motion to continue. POE stated, inter alia, that the HGEA was aware of the negotiations timetable and that Chun was a primary witness when it consented to the trial being scheduled on April 22, 2003.

On April 7, 2003, the Board issued Order No. 2184, granting the HGEA's motion to continue for good cause shown and rescheduling the trial for May 13, 2003.

Thereafter, on May 9, 2003, the HGEA filed Respondent Hawaii Government Employees Association, AFSCME, LOCAL 152, AFL-CIO's Motion to Dismiss Prohibited Practice Complaint in Whole or in Part. The HGEA contends that POE is "estopped from asserting that HGEA failed to settle or engage in settlement negotiations relating to the rest periods issue, during the time period that Case No. CU-03-174 was pending (i.e., from October 6, 2000 through January 13, 2003). Also, the HGEA contends that the complaint fails to state a claim upon which relief can be granted to the extent that the settlement of the rest periods issue cannot be completed unilaterally by the HGEA, and the HGEA should not be held liable for the employer's alleged breach of the Collective Bargaining Agreement (Agreement).

On May 13, 2003, the Board held a hearing on the HGEA's motion to dismiss. The parties were given full opportunity to make their arguments on the motion before the Board. At the close of the arguments the Board took the motion under advisement.

On May 13, 14, and 16, 2003, the Board conducted a hearing on the instant complaint. The parties were given full opportunity to present facts and evidence on the matter.

On June 30, 2003, POE submitted POE's Closing Arguments.

On July 1, 2003 the HGEA filed Respondent Hawaii Government Employees Association, AFSCME, LOCAL 152, AFL-CIO's Ex Parte Motion for an Order Granting an Extension of Time to File Written Closing Arguments. Counsel for HGEA states that after the hearing in the case, the Board set June 30, 2003 as the deadline for the filing of written closing arguments, counsel failed to calendar such deadline and as a result did not file such closing arguments. Counsel also stated that the failure of HGEA to file such closing arguments was affiant's failure to calendar the due date and not due to any conduct of HGEA. Counsel further states that he did not read and will not read POE's closing argument until after he prepares and files Respondent's Written Closing Arguments. The HGEA filed a Supplemental Affidavit in support of its motion on July 2, 2003 where counsel suggested that POE be given the opportunity to file supplemental closing arguments to ameliorate any prejudice. HGEA's counsel requested an extension until 4:00 p.m. on July 3, 2003 to file closing arguments.

On July 3, 2003, POE filed an opposition to the HGEA's ex parte motion for an extension of time to file its closing arguments.

On July 3, 2003, HGEA filed Respondent Hawaii Government Employees Association, AFSCME, LOCAL 152, AFL-CIO's Closing Arguments with the Board. And on July 9, 2003, POE filed a declaration in response to HGEA's counsel's affidavit filed on July 2, 2003.

After considering the arguments presented, the Board hereby denies the HGEA's ex parte motion to extend the time to file a brief in this matter. According to Hawaii Administrative Rules (HAR) § 12-42-8(g)(17)(D),[1] a request for extension of time within which to file a brief or proposed findings shall be made in writing to the Board at least three days before the expiration of the required time for filing. The Board's rules are silent as to a request for extension of time to file briefs filed after the due date. Thus, we look to

---

[1]HAR § 12-42-8(g)(17)(D), Argument, briefs, proposed findings, provides:

> A request for extension of time within which to file a brief or proposed findings shall be made in writing to the board at least three days before the expiration of the required time for filing, and shall be accompanied by an affidavit setting forth the grounds upon which it is based and indicating the position of the other parties with regard to such request.

the Hawaii Rules of Civil Procedure (HRCP) for guidance and HRCP Rule 6(b) provides for enlargement of time and states:

> When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e) and 60(b) of these rules and Rule 4(a) of the Hawai`i Rules of Appellate Procedure, except to the extent and under the conditions stated in them. [Emphasis added.]

The foregoing rule permits the enlargement of time after the expiration where the failure to act was a result of excusable neglect. Here, Respondent's counsel stated that he forgot to calendar the due date for the submission of his brief and therefore failed to timely file his brief. As such, the Board finds that counsel's reason does not rise to the level of excusable neglect which warrants an extension to file his brief and given POE's opposition to the extension, the Board therefore denies Respondent's ex parte motion.

Based on a thorough review of the record in the case, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. POE, at all times relevant, was employed as a Harbor Traffic Controller at Aloha Tower by the State of Hawaii, Department of Transportation (DOT), Harbors Division and included in bargaining unit 03. POE was, for all times relevant, an employee, as defined under HRS § 89-2.

2. Respondent HGEA is an employee organization and the exclusive representative, as defined under HRS § 89-2, of employees in bargaining unit 03.

3. The HGEA and the State of Hawaii have been parties to a collective bargaining agreement (Agreement) covering bargaining unit 03 employees in one form or another continuously from 1993 to the present time.

4. The Board takes administrative notice of Decision No. 439, in Case No. CU-03-174, Lewis W. Poe, 6 HLRB ____ (2003) where POE alleged that the HGEA violated the contractual grievance procedure by failing to file a class grievance with the employer before entering into negotiations to settle the dispute over the DOT's failure to provide rest breaks in accordance with Article 21. The Board takes notice and incorporates the following findings of facts from that case:

* * *

> 4. On or about June or July of 1998, Complainant wrote to HGEA business agent Royden Kotake (Kotake) to inform the HGEA that the employer was violating Article 21 of the BU 03 Contract by not providing any ten minute breaks to the Harbor Traffic Controllers, i.e., Complainant and his co-workers at the Aloha Tower. Kotake investigated the merits of Complainant's complaint. The HGEA was asked by Complainant to file a class grievance on behalf of Complainant and his co-workers.
>
> 5. On July 29, 1998, Complainant filed a prohibited practice complaint against the HGEA for failing to file a class grievance on behalf of Complainant and his co-workers based on the employer's violation of Article 21 for not providing any ten minute breaks in Case No. CU-03-148.
>
> 6. During the course of Board proceedings in Case No. CU-03-148, Complainant received an Affidavit by Kotake dated September 18, 2000, and learned that the HGEA and employer had "entered into settlement negotiations in which it is being proposed that all harbor traffic controllers, including Complainant Poe, will receive twice their pay for their ten minute morning and afternoon paid breaks, irrespective of whether the harbor traffic controllers actually receive said breaks."[2]

---

[2]See Affidavit of Royden Kotake, September 18, 2000, paragraph 4 [in Case No. CU-01-148]. The pertinent text of paragraphs 4 and 5 states:

> 4. With regard to the resolution of the underlying grievance in this case, the HGEA/AFSCME and the Employer of Mr. Poe, namely the Honorable Benjamin J. Cayetano, in his capacity as Governor of the State of Hawaii, have entered into settlement

7. Upon learning that the HGEA had entered into negotiations with the employer, Complainant filed the instant complaint on October 6, 2000 in Case No. CU-03-174 alleging that HGEA entered into negotiations with the public employer outside of the contractual grievance procedure framework to settle a dispute over the failure to provide rest breaks in accordance with Article 21 (Rest Periods) for Complainant and his co-workers employed by the DOT Harbors Division in violation of the BU 03 Contract and

---

negotiations in which it is being proposed that all harbor traffic controllers, including Complainant Poe, will receive twice their pay for their ten minute morning and afternoon paid breaks, irrespective of whether the harbor traffic controllers actually receive said breaks, and in addition the aforesaid Employer will endeavor to give the harbor traffic controllers their ten minute morning and afternoon breaks at a practicable time during their shifts; and

5. This proposal, if adopted, will adequately compensate the harbor traffic controllers, including Complainant Poe, for the foregoing dispute in the underlying grievance, inasmuch as they will be receiving double their pay for the break period to compensate them for the fact that there may be a few times in which they have to forego their break period because of a congested situation in the harbor which prohibits the harbor traffic controllers from safely taking their breaks, and in addition affords the harbor traffic controllers the opportunity to take their morning and afternoon breaks whenever possible. Rarely is there a situation for the harbor traffic controllers in which they are totally unable to take their morning or afternoon breaks at some time during their daily work shifts.

HRS § 89-11(a),[3] thereby violating HRS §§ 89-13(b)(4) and (5).[4]

8. On October 24, 2000, the Board issued Order No. 1946, Order Consolidating Cases, Sua Sponte, Granting Respondent HGEA's Motion to Dismiss Filed September 18, 2000 and Dismissing, Sua Sponte, Complainant's Prohibited Practice Complaint filed on October 6, 2000.

9. On POE's appeal, the First Circuit Court ruled that the Board's dismissal of Case No. CU-03-148 was improper and contrary to law "because it dismissed the complaint that Poe had brought, which should have been defaulted under the board's rules in his favor."[5] HGEA's failure to file a class grievance vis-a-vis its duty of fair

---

[3]HRS § 89-11 states:

> (a) A public employer shall have the power to enter into written agreement with the exclusive representative of an appropriate bargaining unit setting forth a grievance procedure culminating in a final and binding decision, to be invoked in the event of any dispute concerning the interpretation or application of a written agreement. In the absence of such a procedure, either party may submit the dispute to the board for a final and binding decision. A dispute over the terms of an initial or renewed agreement does not constitute a grievance.

[4]HRS § 89-13(b) states in part:

> It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:
>
> * * *
>
> (4) Refuse or fail to comply with any provision of this chapter; or
>
> (5) Violate the terms of a collective bargaining agreement.

[5]See, Partial Transcript of Proceedings before the Honorable Eden Elizabeth Hifo, Judge Presiding, hearing held on Tuesday, June 12, 2001. See also, Order Vacating Board's Order No. 1946, Reversing and Modifying Board's Rulings, and Remanding Consolidated Case to Board with Instruction for Further Proceedings, issued July 3, 2001 in Civil No. 00-1-3607-11.

representation was at issue in Case No. CU-03-148, but is not an issue in the instant complaint.

10. Although HGEA failed to file a class grievance for the Aloha Tower Harbor Traffic Controllers over rest periods under Article 21, Complainant on his own behalf filed an individual grievance as provided under Article 11, Grievance Procedure, against the DOT for failing to provide rest breaks in 1998.[6] The Board finds that Complainant invoked the grievance procedure within the meaning of HRS § 89-11(a) over the DOT's failure to provide Complainant rest breaks.

11. The BU 03 Contract contains Article 11, Grievance Procedure, amended by Memorandum of Agreement on July 17, 2000, which provides for both an Informal Step and formal Steps 1 to 3, and Step 4 Arbitration, "[i]f the grievance is not satisfactorily resolved at Step 3 and the Union desires to proceed with arbitration." Article 11 also provides, in part, that:

> A. Any complaint by an Employee or the Union concerning the application and interpretation of this Agreement shall be subject to the grievance procedure. By mutual consent of the Employee or the Union and the Employer, any time limits within each step may be extended. . . .
>
> B. An individual Employee may present a grievance without intervention of the Union, up to and including Step 3, provided the Union has been afforded an opportunity to be present at the meeting(s) on the grievance. Any adjustment made shall not be inconsistent with the terms of this Agreement.

---

[6]See Exhibit 4b, Affidavit of Royden Kotake, September 18, 2000, attachment "A." Upon filing Case No. CU-03-148, Complainant informed HGEA by letter to Kotake, dated December 10, 1998, that he "effectively revoked" his earlier requests for formal and/or fair representation in a potential class grievance."

* * *

> F. If the Union has a class grievance involving Employees within a department, it may submit the grievance in writing to the department head or designee. Time limits shall be the same as in individual grievances, as prescribed in Paragraph "A", and the procedures for appeal shall be the same as in Step 3.

5. In response to POE's Step 2 grievance, then Director of Transportation Kazu Hayashida stated in a letter dated December 1, 1998:

> This amended response is to advise you that the Department and the Hawaii Government Employees Association, the exclusive representative for Unit 3 employees, are working on resolving the rest periods issue with regard to all of the Marine Traffic Controllers at Oahu District, Harbors Division.
>
> The original proposal to resolve this issue was not considered to be in the best of all parties concerned therefore, we are considering other options at this time.
> Our objective is to resolve this matter by insuring that the Marine Traffic Controllers are compensated for each rest period they are unable to take due to operational commitments. We are working out the details with the Union and hopefully arrive at a satisfactory resolution by way of a settlement agreement or memorandum of understanding.
>
> The Marine Traffic Controllers, including you, will be informed of the results of the discussions with the Union.

Complainant's Exhibit (Ex.) 3.

6. In a letter dated January 22, 1999, then Director of Human Resources Development Mike McCartney responded to POE's Step 3 grievance stating:

> This responds to the above appeal you filed regarding violations of the 10-minute rest provision, Article 21 of the BU 3 Agreement. The Union was offered, but declined, the opportunity to be involved at Step 3.

> The remedy you seek is to DOT to designate the times for your 10-minute rest period in advance of every shift and compensation for missed rest periods since July 1, 1993.
>
> We reviewed your grievance and found that DOT and HGEA are currently engaged in good faith efforts to resolve problems associated with granted 10-minute rest periods for Tower Operators. It is our understanding that any mutually agreeable resolution would apply to all Tower Operations, including you. We are not inclined to disturb these efforts to reach a mutually agreeable resolution and adversely impacted HGEA's representative capacity as the exclusive representative for BU 3 employees.
>
> Based on the foregoing, we decline to act on your grievance and deny the remedy you are seeking for yourself as an individual.

Complainant's Ex. 10.

7. The employer denied POE's individual grievance because of the settlement negotiations with the Union for all Tower Operators, including POE.

8. On or about May 2001, Mr. Amador Casupang, the Director of Transportation's designee prepared a draft settlement and forwarded it to the HGEA.

9. The draft settlement agreement was not disclosed or discussed with POE or similarly situated bargaining unit members at any time between its receipt by HGEA and the filing of the instant complaint on January 16, 2003. Nor did the HGEA respond in any way to the employer's draft.

10. Between 2001 and January, 2003 when the case was assigned to Chun, the record is devoid of any activity on what if anything was done with the draft settlement.

11. The HGEA did not provide any reason or suggestion of a reason for its inactivity during this period.

DISCUSSION

Notwithstanding the many procedural convolutions the uncontested facts most salient to the disposition of this case are:

1. On or about June 17, 1998, POE alerted the HGEA to alleged violations by the employer of contractual provisions, Article 21, providing for rest periods. POE asserted that the violations covered both similarly situated bargaining unit members and himself;

2. On December 1, 1998, in its Step 2 response to an individual grievance filed by POE on the matter, the employer identified the terms of a "tentatively agreed to" remedy the alleged violation "subject to the concurrence of the union and the other marine traffic controllers....;"

3. Subsequent to this communication, HGEA business agent Royden Kotake actively discussed the possible remedy with the employer's representative;

4. On or about January 22, 1999, in its Step 3 grievance response, the employer denied POE's grievance because "DOT and HGEA are engaged in good faith efforts to resolve problems associated with granting 10-minute rest periods" for all Tower Operators;

5. During the course of disposing of a prohibited practice complaint regarding the Union's handling of the Article 21 dispute, the HGEA filed with the Board an Affidavit by Kotake dated September 18, 2000, that the HGEA and employer had "entered into settlement negotiations in which it is being proposed that all harbor traffic controllers, including Complainant POE, will receive twice their pay for their ten-minute morning and afternoon paid breaks, irrespective of whether the harbor traffic controllers actually receive said breaks;"

6. On or about May 2001 Mr. Amador Casupang, the Director of Transportation's designee prepared a draft settlement and forwarded it to the HGEA;

7. The draft settlement agreement was not disclosed or discussed with Poe or similarly situated bargaining unit members at any time between its receipt by HGEA and the filing of the instant complaint on January 16, 2003. Nor had HGEA responded in any way to the employer's draft; and

8. The HGEA did not provide or suggest a reason for its inactivity during this period.

POE asserts that the HGEA's conduct, above, constituted a breach of its duty of fair representation. The HGEA in its motion to dismiss[7] argues that POE is estopped from asserting that HGEA failed to settle or engage in settlement negotiations relating to the rest periods issue, during the time period that Case No. CU-03-174 was pending (i.e., from October 6, 2000 through January 13, 2003). Also HGEA alleges that the complaint fails to state a claim upon which relief can be granted to the extent that the settlement of the rest periods issue cannot be completed unilaterally by the HGEA, and to the extent that HGEA should not be held liable for the employer's alleged breach of the Agreement.

Duty of Fair Representation

The Union's duty of fair representation embodied in HRS § 89-8(a) is twofold. First, the exclusive representative is mandated "to act for and negotiate agreements covering all employees in the unit." Second, the exclusive representative must "be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership." The union's breach of its duty of fair representation is a prohibited practice in violation of HRS § 89-13(b)(4) and HRS § 89-8(a), when the union's conduct is arbitrary, discriminatory or in bad faith. Kathleen M. Langtad, 6 HLRB 423 (2001) citing Vaca v. Sipes, 386 U.S. 171, 190-191, 87 S. Ct. 903, 17 L.Ed.2d 842 (1967) (Vaca).

The burden of proof is on the complainant-employee to show by a preponderance of evidence that: 1) the decision not to proceed to arbitration was arbitrary, discriminatory or in bad faith. Sheldon S Varney, 5 HLRB 508 (1995) (Varney). See also, Vaca, supra, 386 U.S. at 190-191. "[A] union's conduct is "arbitrary' if it is 'without rational basis,'...or is egregious, unfair and unrelated to legitimate union interests." Peterson v. Kennedy, 771 F.2d 1244, 1254 (9th Cir. 1985). Simple negligence or mere errors in judgment will not suffice to make out a claim for a breach of the duty of fair representation. Farmer v. ARA Services, Inc., 660 F.2d 1096, 108 LRRM 2145 (6th Cir. 1981); Whitten v. Anchor Motor Freight, Inc., 521 F.2d 1335, 1341, 90 LRRM 2161 (6th Cir. 1975).

In determining arbitrariness, the Ninth Circuit Court of Appeals has required a finding that the act in question not involve the exercise of judgment, and that the union had no rational reason for its conduct. See Richard Hunt, 6 HLRB 222 (2001) citing Moore v. Bechtel Power Corp., 840 F.2d. 634, 636, 127 LRRM 3023 (9th Cir. 1988).

---

[7]As set forth, supra, the Board did not consider HGEA's written arguments because they were untimely filed.

A union does not breach its duty of fair representation when it exercises its "judgment" in good faith not to pursue a grievance further, Stevens v. Moore Business Forms, Inc., 18 F.3d 1443, 1447, 145 LRRM 2668 (9th Cir. 1994) (Stevens), or by acting negligently, Patterson v. International Brotherhood of Teamsters, Local 959, 121 F.3d 1345, 1349, 156 LRRM 2008 (9th Cir. 1997). As explained in Stevens:

> . . . A Union's decision to pursue a grievance based on its merits or lack thereof is considered an exercise of its judgment. (Citations omitted.) "We have never held that a union has acted in an arbitrary manner where the challenged conduct involved the union's judgment as to how best to handle a grievance. To the contrary, we have held consistently that unions are not liable for good faith, non-discriminatory errors of judgment made in the processing of grievances." (Citations omitted). 18 F.3d at 1447. [Emphasis added.]

In order for POE to prevail against his Union, he must show that the union's conduct is arbitrary, discriminatory or in bad faith. In the grievance context, a union will breach its duty of fair representation if it ignores a meritorious grievance or processes the grievance in a perfunctory manner. However, a union does not breach its duty of fair representation when it does not process a meritless grievance or engages in mere negligent conduct. Varney, supra, at 520. Proof of union error due to negligence, inefficiency, inexperience, or even a misguided interpretation of contract provisions will not suffice. Bruce J. Ching, 2 HLRB 23 (1978).

The absence of a settlement, even after almost seven years, or judgments of the merits of the grievance, even in light of the employer's proposal, cannot solely be the basis of a finding of a breach of duty by the union:

> If the union has made an honest, informed, and reasoned decision not to proceed, it has not breached its duty, even though the decision leaves the individual employee without recourse, other reasonable men might have decided differently, or the union appears in hindsight to have been simply mistaken in the factual premises of its reasoning.

Baldini v. Local 1095, United Auto Workers, 581 F.2d 145, 151 (7th Cir. 1978). Thus the Union's conduct in assuming and negotiating a potential settlement cannot be faulted. There is sufficient evidence to conclude that the Union's decisions in that regard were "honest, informed and reasoned." The very generation of an employer's proposal suggests reasoned conduct.

But such a conclusion cannot be drawn regarding the HGEA's almost two years of inactivity after its admitted receipt of the employer's settlement proposal. The HGEA not only failed to present evidence of its conduct or reasoning during this period, but provided no reasons or suggestions of a reason for its inactivity. If even a scintilla of evidence was presented to suggest that the Union's inactivity was a result of negligence the result herein might be different. But, in the absence of any justification or explanation for the Union's failure to pursue the settlement of POE's grievance for the period between the receipt of the employer's proposal and the filing of the instant complaint, the Board must conclude that the HGEA treated POE and the rest periods issue in a perfunctory manner and thereby violated its duty of fair representation. The Board infers from the totality of the circumstances on the record that the HGEA's conduct was wilful and constituted a prohibited practice.

HGEA's Motion to Dismiss

In its motion, the HGEA contends that POE is judicially estopped[8] from asserting this claim because he took an inconsistent position in Case No. CU-03-174, by asserting that the HGEA could not engage in and continue its settlement negotiations with POE's employer on the rest periods issue, but instead was required to file a class grievance. The HGEA argues that it was thus effectively enjoined from engaging in settlement negotiations with the employer from the time Case No. CU-03-174 was pending, i.e., October 6, 2000 through January 13, 2003.

The facts of this case however do not support the HGEA's claim of estoppel. The HGEA defended its position in Case No. CU-03-174 rather than agree and rely on POE's contentions and the Board agreed that the Union had the right to negotiate a settlement with the employer for the class of Harbor Traffic Controllers regardless of whether a class grievance had been filed. When pleading a defense of estoppel a "[p]leader must allege and prove not only that the person sought to be estopped made misleading statements and representations but that the pleader actually believed and relied on them and was misled to his injury thereby." Black's Law Dictionary (4th Ed.), p. 650. Here, if HGEA claimed and proved that it relied on POE's position in Case No. CU-03-174, estoppel might lie. But as discussed above, the HGEA contested POE's contentions and moreover, provided no reason or rationale for not processing the settlement proposal. Thus, in the absence of any allegation of evidence of detrimental reliance, the motion to dismiss must be denied in this regard.

---

[8]"A party will not be permitted to maintain inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him, at least where he had, or was chargeable with, full knowledge of the facts and another will be prejudiced by his action." Nelson v. University of Hawai`i, 99 Hawai`i 262, 268, 54 P.3d 433 (2002); Roxas v. Marcos, 89 Hawai`i 91, 124, 969 P.2d 1209 (1998).

The HGEA also contends that any claims by which they would be held responsible to remedy the alleged contractual violations underlying POE's grievance must be dismissed because the Union lacks the power to unilaterally resolve or remedy the alleged contractual violations.

As the employer was not a party to the complaint, the Board is without jurisdiction to render a finding or fashion a remedy for a contract violation. In the unequivocal absence of jurisdiction over the subject matter of a possible contract violation by the employer, the Board will not impute or infer any claims in this regard.

The Remedy

In the instant case, the Union dropped the proverbial ball when it failed to follow up in the course of negotiating a settlement over the rest periods grievance for all the Harbor Traffic Controllers, including POE, with the Department of Transportation (DOT). At this point, a cease and desist order to the Union would be meaningless. Moreover, since the employer is not a party to the instant complaint, the Board is unable to fashion a remedy to require the employer to adopt the proposed settlement it gave to the Union for consideration more than three years ago.

The settlement offer by the employer came to light during the prohibited practice proceedings initiated by POE in Case No. CU-03-174, supra. In that case, POE contended that the HGEA violated the contractual grievance procedure and HRS § 89-11(a) by entering into negotiations with a proposal to resolve a violation of Article 21, rest periods, without filing a class grievance on behalf of Harbor Traffic Controllers. Based on the record in this case, the Union did nothing to consummate a negotiated settlement agreement to resolve the rest periods issue prompted by POE's grievance.

In order to fashion a remedy in this case, and given the policy favoring arbitration as the procedure agreed to by the parties to resolve complaints arising under the Unit 03 Contract, the Board orders the Union to proceed to arbitration as the most appropriate forum to resolve this grievance once and for all. Consequently, the time limits to request arbitration shall be deemed to run from the date of this decision and the Union has ten working days from the date of this decision to issue its notice of intent to arbitrate the Article 21 rest periods grievance to the employer to satisfy the contractual time limits. The Union is further ordered to keep POE apprised of its efforts.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this complaint pursuant to HRS §§ 89-5 and 89-13.

2. The union's breach of its duty of fair representation is a prohibited practice in violation of HRS § 89-13(b)(4) and HRS § 89-8(a), when the union's conduct is arbitrary, discriminatory or in bad faith.

3. In the instant case, the Complainant has the burden to prove by a preponderance of evidence that Respondent's inactivity over a two-year period toward resolving a rest periods grievance after a written settlement was proposed by the Employer was arbitrary, discriminatory or in bad faith.

4. In the absence of any justification for the Union's failure to pursue the settlement of Poe's grievance for the period between the receipt of the employer's proposal and the filing of the instant complaint, the Board concludes that the HGEA violated its duty of fair representation to POE.

ORDER

Based on the foregoing, the Board issues the following order:

1. The HGEA shall cease and desist from breaching its duty of fair representation to POE for its inactivity in resolving the rest periods issue after the employer submitted a proposed settlement, and notwithstanding the employer's denial of POE's grievance at Step 3.

2. The HGEA shall cease and desist from committing prohibited practices and shall keep POE apprised as to the processing of his grievance to arbitration.

3. Within ten working days from the date of this Board decision, Respondent shall notify the employer of its intent to proceed to arbitration over the employer's denial at Step 3 since the DOT and HGEA failed to resolve the Article 21 issue. The time limits to request arbitration shall be deemed to run from the date of this decision.

4. Respondent shall immediately post copies of this decision in conspicuous places at work sites where employees of Unit 03 assemble and congregate, and on the Respondent's website for a period of 60 days from the initial date of posting.

5. Respondent shall notify the Board of the steps taken to comply herewith within 30 days of the receipt of this order with a certificate of service to the Complainant.

LEWIS W. POE v. HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO
CASE NO. CU-03-214
DECISION NO. 446
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

DATED: Honolulu, Hawaii, February 19, 2004.

HAWAII LABOR RELATIONS BOARD

BRIAN K. NAKAMURA, Chair

CHESTER C. KUNITAKE, Member

KATHLEEN RACUYA-MARKRICH, Member

Copies sent to:

Lewis W. Poe
Neal S. Aoki, Esq.
Joyce Najita, IRC
William Puette, CLEAR State Archives
Publications Distribution Center
University of Hawaii Library
Richardson School of Law Library
Library of Congress